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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of) MM DOCKET NO. 93-75
)
TRINITY BROADCASTING OF)
FLORIDA, INC.) File No. BRCT-911001LY
)
For Renewal of License of)
Station WHFT(TV) (Channel 45),)
Miami, Florida)
)
GLENDALE BROADCASTING COMPANY) File No. BPCT-911227KE
)
For a Construction Permit for)
a New TV Station on Channel 45)
at Miami, Florida)

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To: Review Board

MASS MEDIA BUREAU'S
LIMITED EXCEPTIONS TO INITIAL DECISION

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Summary

In his Initial Decision, the Presiding Judge denied Trinity's application for renewal of license of WHFT(TV), Channel 45, Miami, Florida, and granted Glendale's mutually exclusive application for a new commercial TV station to operate on Channel 45 in Miami.

The Presiding Judge's decision denying Trinity's application for renewal of license of WHFT(TV) is supported by substantial record evidence. Accordingly, the Initial Decision, insofar as the disposition of Trinity's renewal application is concerned, should be affirmed.

The Bureau reaches a different conclusion with respect to the Initial Decision's treatment of Glendale. The Bureau submits that the Initial Decision erred in finding Glendale basically qualified. Glendale is controlled by George Gardner who, in multiple applications for extension of time within which to construct LPTV stations, misrepresented material facts to, and omitted decisionally significant information from, the Commission. In characterizing the applications as merely containing imprecise language and innocent exaggerations, the Initial Decision erroneously discredited compelling evidence of an intent to deceive the Commission. Glendale is basically unqualified to be a Commission licensee, and the Review Board should reverse the Initial Decision to the extent that it granted Glendale's application.

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To: Review Board

MASS MEDIA BUREAU'S
LIMITED EXCEPTIONS TO INITIAL DECISION

The Mass Media Bureau, by its attorneys and pursuant to §§ 1.276 and 1.277 of the Commission's Rules, hereby submits its Limited Exceptions to the Initial Decision of Administrative Law Judge Joseph Chachkin, FCC 95D-13 (released November 6, 1995) ("ID"). The ID denied the application of Trinity Broadcasting of Florida, Inc. for renewal of license of Station WHFT(TV), Miami, Florida, and granted the competing application of Glendale Broadcasting Company ("Glendale") for a construction permit for a new commercial television station to operate on Channel 45 in Miami. The ID's denial of Trinity's renewal application was supported by substantial record evidence, and,

consequently, the ID should be affirmed insofar as Trinity is concerned. However, the ID erred in finding Glendale to be basically qualified and in granting Glendale's application. Accordingly, the Bureau's instant exceptions are limited to the ID's disposition of the Glendale application.

I. STATEMENT OF THE CASE

1. By Hearing Designation Order, 8 FCC Rcd 2475 (1993) ("HDO"), the Commission designated the above-captioned applications for a hearing in a comparative proceeding. By Memorandum Opinion and Order, FCC 93M-469 (released July 15, 1993), the Presiding Judge added the following issue against Glendale:¹

To determine whether Raystay Company made misrepresentations or lacked candor in low power television applications for extensions of broadcast construction permits and, if so, the effect thereof on Glendale Broadcasting Company's qualifications to be a licensee.

2. Most of the facts recited in the ID are not disputed. George Gardner is

¹ By Memorandum Opinion and Order, FCC 93M-631 (released October 4, 1993), the Presiding Judge added a second issue against Glendale:

To determine whether Raystay Company made misrepresentations or lacked candor in its application to assign the construction permit of low power television station W23AY, Red Lion/York, Pennsylvania (BAPTTL-920114IB), and, if so, the effect thereof on Glendale Broadcasting Company's qualifications to be a licensee.

The Bureau agrees with the ID's resolution of this issue in Glendale's favor. Consequently, the Bureau's instant exceptions are limited solely to the ID's resolution of the issue involving Raystay's extension applications.

Glendale's controlling principal and, at all relevant times, has held the same status with respect to Raystay Company ("Raystay"). ID at ¶ 210. George Gardner is, and always has been, actively involved in Raystay's management. He maintains an office at Raystay, sets policies for the company, supervises all aspects of Raystay's operations, and makes final decisions on all significant matters. He has always exercised complete control of Raystay. Tr. 4562-63.

3. Raystay was granted construction permits for five LPTV stations on July 24, 1990. The construction permits specified an expiration date of January 24, 1992. ID at ¶ 218. Two of the stations' antennas were to be co-located atop a concrete company structure in Lancaster, Pennsylvania; two more were to be co-located on the roof of a hotel in Lebanon, Pennsylvania; and the fifth was to be located on property owned by Raystay in Red Lion, Pennsylvania. ID at ¶ 216.

4. Initially, it was Raystay's good faith intention, according to an LPTV Business Plan developed in February 1991 by a Raystay company executive, to construct all five of the stations and, in concert with Raystay's already-operational LPTV Station W40AF, Dillsburg, Pennsylvania, to operate them as a regional network in the Harrisburg, Lancaster, Lebanon, and York area. The regional network idea was predicated on cable carriage. ID at ¶¶ 219-220. However, despite talks with cable operators in the area, Raystay was unable to forge a consensus among them about the programming that would be provided. Additionally, Station W40AF was losing money. In light of Station W40AF's lackluster performance and

Raystay's inability to garner support among cable operators, George Gardner became convinced that a viable LPTV business plan did not yet exist. Consequently, he refused to authorize the construction of the new LPTV stations. ID at ¶¶ 221-222.

5. The record evidence indicates that no later than May 1991, George Gardner abandoned any realistic expectation of implementing Raystay's LPTV Business Plan. ID at ¶ 246. The Raystay executive who had been in charge of developing the LPTV stations was reassigned by George Gardner to other tasks. Thereafter, the executive had no further direct involvement in Raystay's LPTV construction permits. Additionally, Raystay began to actively entertain proposals regarding the construction permits from outside the company. In May 1991, Raystay signed a series of contracts with Quality Family Companies, which agreed to build and operate the stations at its own expense while allowing Raystay to retain control of the programming. However, approximately three months later Raystay exercised its option to terminate the contracts because of alleged breaches by Quality Family Stations. ID at ¶ 246.

6. Thereafter, Raystay took steps to get out of the LPTV business altogether. During the remainder of 1991, Raystay, under George Gardner's direct supervision, engaged in negotiations aimed at selling *all* of its LPTV facilities -- the five bare construction permits *and* LPTV Station W40AF -- to several entities including Trinity, an individual by the name of Robert Shaffner, and a company called Grosat Communications, Inc. In early 1992, Grosat acquired Raystay's bare Red Lion construction permit. ID at ¶¶ 256-259.

7. During 1991, while Raystay was trying to sell its LPTV authorizations, the company was also in the process of attempting to restructure its existing debt and obtain additional debt financing for the company. Toward that end, Raystay began negotiating with a company called Greyhound Financial Corporation. Greyhound expressed the firm position early on that no proceeds from any loan that it provided to Raystay could be used to develop the unbuilt LPTV stations. This restriction on the use of loan proceeds was ultimately reflected in the final agreement that Raystay executed with Greyhound in July 1992. Consistent with this restriction, George Gardner never authorized the allocation of any money in any of Raystay's annual budgets for the construction of the LPTV stations. ID at ¶¶ 250-255.

8. By January 1992, the end of the 18-month construction period, Raystay had not ordered any equipment, had not commenced any physical construction, had not budgeted any money, and had no business or other plans under consideration or in place for building out the Lebanon and Lancaster LPTV construction permits. In an effort to preserve the four bare authorizations in the event that a deal to use or sell them materialized, Raystay filed in December 1991 what would become its first set of four applications for extensions of time within which to complete construction of the Lebanon and Lancaster LPTV stations. George Gardner personally reviewed the applications and certified to the truthfulness of the statements in each before filing them with the Commission. ID at ¶¶ 223, 228-229. Each of the applications contained an identical supporting exhibit which, in its entirety, stated:

The permittee respectfully submits that a grant of the instant application would be in the public interest for the following reasons:

Initially, it must be noted that Raystay Co. has built and is currently the licensee of LPTV station W40AF licensed to Dillsburg, PA. Raystay built the station pursuant to a construction permit issued to it by the Commission.

At the present time, equipment for the station has not been ordered or delivered. Raystay, however, has had discussions with equipment suppliers concerning the types and prices of equipment that could be used at the site specified in the construction permit. It has entered into lease negotiations with representatives of the owners of the antenna site specified in the applications, although those negotiations have not been consummated. A representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications need to be done at the site.

Raystay has undertaken research in an effort to determine the programming that would be offered on the station. It has had discussions with program suppliers to determine what programs could be available for broadcast on the stations. It has also had continuing negotiations with local cable television franchises to ascertain what type of programming would enable the station to be carried on local cable systems.

The denial of this extension request would eliminate any possibility of the proposed LPTV service being offered to the community. No application mutually exclusive with Raystay's construction permit application was filed, so no other entity has expressed an interest in providing this service.

Accordingly, Raystay requests that the Commission extend the date for construction for a period of six months from the date the current construction permit expires, which is later.

ID at ¶ 230.

9. The *sole* basis for Raystay's claim in ¶ 3 of its supporting exhibit, that it had "entered into lease negotiations" with representatives from the proposed Lancaster and Lebanon transmitter sites, was a *one-minute* telephone conversation that George Gardner's son, David Gardner, had in October 1991 with an individual from the concrete factory and

another *one-minute* telephone conversation that David Gardner had at about the same time with someone from the hotel. David Gardner did not initiate those conversations to discuss the terms and conditions under which Raystay would be permitted to lease the sites. Rather, he called the concrete company and the hotel merely to arrange for inspections of the sites by an engineer working for a company with which Raystay was negotiating at the time to sell the bare construction permits. Furthermore, the engineer did not inspect the sites to ascertain what preparations or modifications Raystay needed to make in order for Raystay to construct the stations. Rather, the engineer inspected the sites to determine what preparations or modifications the engineer's company might need to make if the engineer's company purchased the permits. ID at ¶ 236.

10. The Commission granted Raystay's first set of extension applications on January 29, 1992. ID at ¶ 229. The Commission gave Raystay until July 29, 1992, to construct and commence operations at the four new facilities. During the period from January 29, 1992, to July 29, 1992, Raystay continued to entertain offers to buy its LPTV construction permits. During this period, no equipment was ordered, no construction was commenced, and no business or other plan was developed for the stations. Significantly, during this period, Raystay engaged in no discussions, dialogues, conversations, or negotiations with anyone from the concrete company or hotel, and no engineer visited either proposed transmitter site to ascertain what preparation work or modifications needed to be made. ID at ¶ 247.

11. Nevertheless, when Raystay filed its second set of extension applications in July

1992, each application contained the *identical* supporting exhibit -- including references to lease negotiations and an engineering inspection -- that it had used to support each of its December 1991 extension applications. Again, George Gardner personally reviewed the applications and certified to the truthfulness of the statements in each before filing them with the Commission. The Commission granted the second set of applications on September 23, 1992. ID at ¶¶ 248-249.

12. After a full evidentiary hearing, the Presiding Judge determined that Raystay Company ("Raystay") had not misrepresented material facts or lacked candor in any of its extension applications. Specifically, the Presiding Judge found that "while Raystay's [eight extension applications] may have contained language which can be characterized as 'exaggerated' or 'puffing', no intentional deception has been demonstrated." ID, at ¶ 342. Accordingly, the ID concluded that Glendale was basically qualified to be a licensee, and it granted Glendale's captioned application.

II. QUESTION PRESENTED

Whether the ID erred in concluding that Raystay did not make misrepresentations or lack candor in its applications for extension of time within which to construct four LPTV stations.

III. ARGUMENT

The ID Erroneously Discredited Compelling Evidence that Raystay Misrepresented Material Facts and Omitted Decisionally Significant Information in Eight Extension Applications Filed With the Commission.

13. It is well established that an intent to deceive is the *sine qua non* of a misrepresentation issue. Armando Garcia, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988), rev. denied, 3 FCC Rcd 4767 (1988). While misrepresentations involve false statements of fact made with an intent to deceive, lack of candor involves concealment, evasion, and other failure to be fully forthcoming. Both represent deceit, differing only in form. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Absolute candor is perhaps the foremost prerequisite for FCC licenseship. Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312; Mid Ohio Communications, 104 FCC 2d 572 (Rev. Bd. 1986), rev. denied, 5 FCC Rcd 940 (1990). Indeed, "the Commission's demand for absolute candor is itself all but absolute." Kate F. Thomas, 8 FCC Rcd 7630, 7632 (Rev. Bd. 1993), citing, Emission de Radio Balmaseda, Inc., 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 4335 (1993), citing, Richardson Broadcast Group, 7 FCC Rcd 1583 (1992). In the context of extension applications, the Commission has stated:

[T]he mere filing of an assignment application does not entitle the permittee to a grant of its extension application. See, e.g., Rappaport Communications, Inc., 2 FCC Rcd 175 (1987), and New Orleans Channel 20, 104 FCC 2d at 314. Furthermore, when we amended our rules in 1985 to establish stricter guidelines for the granting of broadcast applications for extensions of time to construct, Construction of Broadcast Stations, 102 FCC 2d 1054 (1985), we deleted that part of Section 73.3534 of the Rules that had permitted grants of extension applications upon a showing of 'other matters,' such as the pendency of an assignment application and the assignee's ability to quickly construct the station. See also Community Telecasters of Cleveland, Inc., 58 FCC 2d 1296, 1303 (Rev. Bd. 1976) (even under the old rule, the permittee's extension of time request filed for the purpose of assigning the permit and recovering its expenses does not warrant grant of an extension.).

Community Service Telecasters, Inc., 6 FCC Rcd 6026, 6029 (1991).

14. As discussed more fully below, Raystay intended to deceive the Commission, and, in fact, did deceive the Commission, on multiple occasions. All of Raystay's extension applications conveyed the false impression that Raystay had taken concrete steps toward constructing the referenced LPTV stations. In reality, though, Raystay had done almost nothing toward building the stations prior to filing the first set of extension applications. Worse, Raystay made no move to construct the stations between the grant of its first set of extension applications and the filing of its second set of applications. Nevertheless, Raystay falsely implied to the Commission at two different times that serious efforts were underway to build the stations and that, in the absence of extensions, the stations would not be constructed. Raystay's motive for this tale of deceit was simple: it wanted time to shop the bare construction permits so it could recoup some or all of its expenses.

15. With respect to Raystay's first set of extension applications, filed in December

1991, the ID at ¶ 339, n. 53, erroneously dismisses as irrelevant the fact that the engineer who inspected the proposed transmitter sites (in order to ascertain "what site preparation work and modifications need to be done") was an engineer working for a potential buyer. The supporting exhibit to each application was designed to justify to the Commission why an extension of time for *Raystay to complete construction* was warranted. Raystay intentionally misled the Commission by failing to identify the company for whom the engineer was working and creating the false impression that the engineer had engaged in performing activities in furtherance of *Raystay's* efforts to construct and operate the stations. The engineer did not travel to the sites to assist Raystay. Rather, the engineer inspected the two transmitter sites on behalf of a potential buyer of the construction permits. Raystay's omission of this material information in its extension applications is not only relevant, it is extremely significant because it plainly indicates Raystay's willingness to deceive the Commission.

16. Similarly, the ID, at ¶ 342, errs by characterizing as merely "imprecise" Raystay's false claim in the first set of extension applications that it had entered into "lease negotiations" with the owners of the two sites. This claim was based exclusively on a one-minute telephone conversation between David Gardner and someone at the cement factory and another, equally brief telephone conversation between David Gardner and an individual at the hotel. The record evidence reveals that David Gardner made the calls solely to arrange for an inspection of the sites by an engineer representing a company that was interested in buying the bare permits from Raystay. Raystay's representation in each

extension application about "lease negotiations" was designed to convey the impression that it had entered into a dialogue with the site owners concerning the terms and conditions under which Raystay could lease the sites. However, there were no "negotiations" as such during either of the brief, 60-second chats, and neither telephone conversation even touched on the subject of a "lease." It can only be concluded that Raystay had no intention of building the stations and that it filed the extension applications in order to allow for the possibility of their sale. Moreover, the only logical inference that can and should be drawn is that Raystay attempted to mislead the Commission.²

17. The ID, at ¶ 343, further errs by failing to provide *any* reasoned analysis of the representations in Raystay's second set of extension applications, filed in July 1992. Raystay utilized the same exhibits to support the second set of extension applications that it used to support the first set of extension applications. The supporting exhibit to the second set should have informed the Commission of the activities that Raystay performed between January and July 1992 in furtherance of constructing the LPTV stations. However, Raystay performed no such activities during this period. Thus, there were no discussions with equipment suppliers, no lease negotiations, no visits to the antenna sites, no program research, no discussions with program suppliers, and no negotiations with local cable

² The ID, at ¶ 342, appears to suggest that there can be no finding of misrepresentation because if Raystay had *really* wanted to falsely make a case for grant of its extension applications, it would have gone far beyond merely representing that it had "entered" into lease negotiations. The fact that Raystay might have made *other* misrepresentations in its extension applications, had it been more creative, does not diminish the significance of the misrepresentations that it did make.

television franchises. In the absence of any justification for these representations in Raystay's second set of extension requests, it belies logic how the ID was able to conclude that there was no evidence of misrepresentation or lack of candor.³

18. The ID, at ¶¶ 346-348, also misconstrues the significance of Raystay's efforts to sell the construction permits, its voluntary refusal to allocate money in its budgets to build the stations, and the restrictions in Raystay's loan agreement with Greyhound. Assuming, arguendo, that Raystay did not have an obligation to report these matters in its extension applications, they clearly support the inference that Raystay lacked the intent, desire, and perhaps even the financial ability to construct the stations and place them in operation. When this inference is combined with the unsupported representations in the eight extension applications, the only conclusion that can be drawn is that Raystay intended to deceive the Commission.

³ The ID, at ¶ 343, is troubling in other respects. For example, it suggests there that there is no basis for finding a misrepresentation in the second set of extension applications because if Raystay were *really* bent on deceiving the Commission, it would have varied the supporting exhibits to show that substantial progress had been made or that no progress had been made for reasons beyond the licensee's control. Again, the fact that Raystay might have made *other* misrepresentations in its extension applications, had it been more imaginative, does not diminish the significance of the misrepresentations that it did make. Also, the ID, at ¶ 343, despite finding that "the record does not reveal" why the Commission's staff granted the second set of extension applications, nevertheless draws the apparently unsupported conclusion that the grant could not have resulted from Raystay's deceit. Finally, the ID, at ¶ 343, suggests that Raystay's culpability is somehow diminished because of the company's reliance on counsel. This is curious at the very least, given the ID's acknowledgement concerning Trinity, at ¶ 332, that an "experienced broadcaster with significant business experience has a lesser basis for claiming reliance on counsel." RKO General, Inc., 5 FCC Rcd 3222, 3224 (1990); Algreg Cellular Engineering, 9 FCC Rcd 5098, 5142 (rev. Bd. 1994). Like Paul Crouch, George Gardner is an experienced broadcaster, and he knows what is expected of an applicant.

19. Furthermore, the ID's conclusion, at ¶¶ 262-263, that the "possibility of selling the construction permits played no role" in the decision to file any of the extension applications, is belied by the record evidence. The record in this proceeding reveals that virtually the *only* thing Raystay did with the construction permits after George Gardner rejected the regional network idea as a viable plan was to entertain offers from prospective buyers. Indeed, Raystay never once ignored an expression of interest from a possible assignee. If Raystay had no desire to sell its construction permits, it would not have considered offers from interested parties or, worse, entered into serious negotiations with some of them. The ID, at ¶¶ 262 and 345, also erroneously credits the claim by one company official that Raystay would not have sought extensions merely to sell the permits, given the insignificant value of the bare authorizations. However, this claim is belied by the fact that Raystay readily expended the time and administrative expenses involved in selling its bare Red Lion construction permit when George Gardner was presented with a viable offer. While the ID is perhaps correct, at ¶¶ 262 and 345, that Raystay had little to gain from selling the bare permits, George Gardner recognized that what little Raystay could get for them was better than nothing -- which is what the permits would have been worth had they been allowed to expire. In the absence of any plans to build the LPTV stations, the only reason Raystay filed the extension requests was to keep the permits alive, sell them if a good offer materialized, and recoup some, if not all, of its expenses.

20. Finally, the ID's conclusion, at ¶ 349, that there is "*no evidence* that George Gardner had *any* reason to know" that the statements in the extension applications might be

false, does not withstand scrutiny. George Gardner controlled Raystay's management and supervised every aspect of Raystay's operations. George Gardner personally reviewed and signed all of the extension applications before they were filed with the Commission. George Gardner knew when he reviewed and signed the applications that he had reassigned to other duties the Raystay executive who was in charge of developing the LPTV permits. George Gardner knew when he reviewed and signed the applications that Raystay's LPTV Business Plan -- the only plan that Raystay had developed for using the permits -- was unacceptable. George Gardner knew when he reviewed and signed the applications that Raystay had no other blueprints under consideration for building and operating the stations. George Gardner knew when he reviewed and signed the applications that Raystay's LPTV Station W40AF was a money-losing operation. Furthermore, George Gardner knew when he reviewed and signed the applications that Raystay was actively engaged in trying to sell the permits. Under these circumstances, it is simply incredible for the ID to have suggested that George Gardner did not comprehend and appreciate the utterly false impressions that the applications conveyed. George Gardner, the controlling principal in, and common link between, Raystay and Glendale, had ample reason and opportunity to question the veracity of the statements in the extension applications. Indeed, he had an *obligation* to ensure the truthfulness of the statements before personally certifying to their accuracy. Thus, even assuming, arguendo, that he lacked personal knowledge about some of the information in the applications, George Gardner's failure to *ensure* that the information was truthful before so certifying constituted gross negligence and wanton carelessness, which are the functional equivalents of an intent to deceive. See Golden Broadcasting Systems, Inc., 68 FCC 2d 1099, 1106 (1978).

IV. CONCLUSION

21. In the final analysis, the ID's suggestion that the representations in Raystay's extension applications were merely imprecise or exaggerated or constituted "puffing" is flatly rebutted by the record evidence. Raystay did not simply put a clever "spin" on the information in its extension applications or innocently embellish certain matters in order to enhance its chances before the Commission. Rather, Raystay deliberately omitted decisionally significant facts from the applications, and it intentionally included information in the applications which it knew to be false. Raystay's motive was to keep the permits viable to allow for their possible sale.

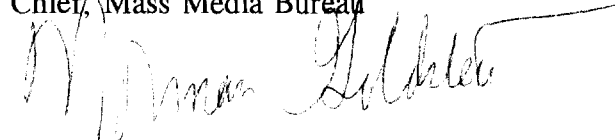
22. Based on the foregoing, the Bureau respectfully requests the Review Board to reverse the ID insofar as Glendale is concerned by resolving the "extension application" issue adversely to Glendale, concluding that Glendale is basically unqualified to be a Commission licensee, and denying its captioned application for a construction permit for a new television

station to operate on Channel 45 in Miami, Florida.

Respectfully submitted,

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January 23, 1996

CERTIFICATE OF SERVICE

I, Natalie Moses, a secretary in the Complaints and Investigations Branch, Mass Media Bureau, certify that I have, on this 23rd day of January 1996, sent by regular United States mail, copies of the foregoing, "Mass Media Bureau's Limited Exceptions to Initial Decision" to:

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